Judge Parsons Makes Strong Plea for Reform in Court Procedure

Judge Charles F. Parsons of the fourth circuit court, in delivering a charge to the new grand jury in Hilo, criticised at some length the present judicial system. In no uncertain manner the jurist scored the reversal of decisions on technicalities and the employment of petty subterfuges to defeat the ends of justice. The charge in full follows:

Gentlemen of the Grand Jury:

Your roll-call is reminiscent of former terms. With few exceptions your members have served, not once but many times and at least five of your number have acted as foremen of other grand juries. The proceedings of the grand jury room and the rules governing these proceedings are as well-known to you as they are to the prosecuting officer and the Court.

What is to be said to you today relates not so much to your powers and duties as grand jurors, as it does to certain legalized abuses which you, the trial jury, counsel and court may aid in remedying. I refer to abuses made possible by a system of technical procedure, which coddles criminals, which hampers inquiry into essential facts, which is dilatory, expensive, frequently productive of absurd results, and which is still retained despite the protests of litigants, press, public and judges who are its interpreters. The unsatisfactory working of the system has been shown in many instances but seldom more clearly, so far as examples in this circuit are concerned, than in two sets of cases which have occupied much of the time of the court and different juries for more than two months past. In the first instance, the defendant was a county officer charged with false certification, forgery and embezzlement; in the second there were two defendants charged with larceny in the first degree. After the commitment of the county officer the authority of the judge to act in any manner was tested in a proceeding before the supreme court. Then the grand jurors were challenged individually and collectively. Indictments were found in 17 cases. To these indictments pleas in abatement were interposed and demurrers were filed to the pleas in abatement, which were followed by demurrers to the indictments. In the false certification and forgery cases the demurrers were sustained and the defendant was discharged, without any legal possibility of inquiry before the jury then in session as to whether he had or had not committed the graver of the offenses charged. In the five embezzlement cases the demurrers were over-ruled and the defendant was required to plead. He plead not guilty, and his plea upon trial proved to be a technical one, for one of the defenses relied upon was that the proof showed that he had come wrongfully into possession of property which the indictment charged had been "entrusted" to his keeping. The defendant availing himself of his constitutional privilege, did not testify, from which fact under the law no inference of guilt could be drawn. No testimony was introduced contradicting the evidence of the prosecution. The trial lasted six days. Upon authority of a few cases apparently approved in a dictum of the supreme court of this territory, the jury was charged in effect that the alleged wrongful acquisition of the money by the defendant could not avail him in a criminal action for its subsequent misappropriation, if it appeared that he collected the same under pretense of being authorized so to do by the county. The jury was also given 20 instructions requested by the defendant. After several ballots the jury returned a verdict of guilty, which verdict was excepted to by the defendant as being contrary to the law, the evidence and the weight of the evidence. Exceptions were taken to adverse rulings during the trial, and the case is soon to be taken to the supreme court.

In a case so closely contested, extending over a period of six days, error is practically certain and reversible error is not improbable. If the latter is found the judgment will be subject to reversal without reference to the guilt or innocence of the defendant.

The second set of cases referred to are known locally as the Hamakua Cattle Stealing cases. Two men, one of them a butcher who had stolen cattle many times before and who is now serving a sentence for two such offenses, and the other a plantation employee well acquainted with the derelictions of his associate, at dead of night took from the plantation pasture, without the knowledge or consent of the owner, a dairy cow and heifer, the property of the plantation, valued at $135.00. The animals were slaughtered. Their loss was discovered and their hides were found in the possession of the butcher and identified on the following day. These facts were proved and were undisputed in each case. The plantation employee said that he believed the cattle to be property of the buthcher; the butcher said that he believed them to be the property of the employee. Each claimed to have been misled by the misrepresentations of the other. After two trials consuming four days each, the plantation employee was acquitted. After two days' trial and and nine hours deliberation in the case against the butcher, the Jury reported a disagreement and a mistrial was entered. The case was afterwards nolle prossed. After the trial of the first case special venires were required to produce qualified jurors. At different times there were in attendance from fourteen to forty-four veniremen, who were each paid $3.00 per diem. Their fees while in attendance upon these cases aggregated $1,006.00 and statutory witnesses' fees amounted to $311.80 more. Counting the value of the time of the Government officers engaged in different capacities in the trial of this case, the acquittal and discharge of these two defendants has cost public approximately $1,700.00 in the Circuit Court alone, to say nothing of the amount which it has cost the defendants.

While these cases are perhaps extreme illustrations of the excessive cost of criminal litigation, they are, in a measure, typical. Since the 1st day of July last there have been disposed of before juries in this Circuit sixteen criminal and one civil cases besides 134 cases without juries, including equity, probate, divorce and other Chambers cases. Of the $7,000 appropriated for Court expenses a balance of only about $1,400.00 remains to carry us through the fiscal period; a sum insufficient to pay for another experience like that of the Cattle Stealjury waived, remain to be tried during that period.

Part of the blame for this state of affairs is unquestionably due to the jury system. Many of the jurors listed for this year have never served before; several were excused for statutory disqualifications; a few were men of experience, but against a large proportion of these latter peremptory challenges were exercised. The result was what might have been expected The testimony of witnesses was not in all cases skilfully sifted and weighed. The specific issues of fact were too often lost sight of in the consideration of immaterial matters and legal rules apparently were not always applied to the facts found. The outlook, however, in this regard is not necessarily discouraging for former years have demonstrated that with repeated experience untrained jurors may develop into experts. If this process is repeated and no substantial injustice results we can well afford to regard with complaisance the cost and the few unwarrantable acquittals which accompany it, in view of the educational effect which the experience shall have had upon so large a part of the public.

The principal cause of the condition complained of and others equally deplorable, is our archaic procedure. Devised originally to alleviate the barbarities of the law of England, adopted here where these barbarities have had no considerable place and retained long after its abandonment in the country of its origin, where the last reason for its existence has ceased to be. Some of the technicalities of our criminal and civil procedure have no counterpart in the laws of England or her Colonies, or in the laws of any country of Europe, but so firmly entrenched are they—certain of them behind constitutional guaranty and others behind Statute and decision—that their dislodgement seems almost impossible. The task is one which is engaging the energies of some of the ablest men of the legal profession. The American Bar Association has taken up the work, as have also the Bar Associations of different States and these bodies have been ably assisted by the press, the magazines and College lectures. "The World's Work" is now publishing a series of articles by George W. Alger, entitled "Swift and Cheap Justice" and the lectures of Moorfield Story and Frederick N. Judson have recently been issued in book form by the Yale University Press under the titles "The Reform of Legal Procedure" and "The Judiciary and the People," respectively.

Among the reforms advocated are the following:

1. Simple indictments;
2. The right of the trial judge to charge upon the facts;
3. The right to comment upon the defendant's failure to testify in his own behalf;
4. Reversal upon appeal for errors affecting the merits only;
5. Final judgment in appellate court instead of order remanding for new trial;
6. Findings of fact instead of general verdicts by juries.

Each of the proposed reforms above enumerated, with special reference to the above-named authors' views, will be considered briefly without any attempt to deal at length with the obstacles, real or fancied, to the adoption of such proposed reforms.

1. Indictments

"To accomplish its purpose," says Mr. Storey, "criminal procedure should be simple, prompt and effectual. The guilty should feel that the arm of the law is sure and strong. Today the law as administered throws around the criminal a protecting wall which may have been necessary when the power of the English crown pressed despotically upon the subject, but which is wholly unnecessary today. It is the community that now needs protection against the criminal, not the innocent man who must be saved from unjust prosecution. Today it is said with a certain bitter truth that the only man whose life is safe is he who has been convicted of murder.

"What are the difficulties? The detection and arrest of the criminal are for the police, and with the difficulties which beset these the courts have little to do. We will assume that the accused has been caught and the evidence laid before the grand jury. The first step is to find an indictment, and to this the defendant is required to plead.

"Now the whole object of an indictment is to inform the court, the jury and the prisoner of what the charge against the prisoner is. As a rule no one knows so well as the accused exactly what he has done, and what the indictment means. There is no reason why the indictment should not state the charge in the simplest and most direct language, as for example, why an indictment for murder should not be in as few words as the following:

"'The grand jurors charge that A on the 1st day of March at Boston in the county of Suffolk did commit murder by killing B.'

"A form substantially like this is now used in England and her colonies, and there is no crime which can not be charged with equal brevity. Such an indictment informs the accused of exactly the charge against him, and accomplishes every purpose of an indictment. If it is insufficient and he wants further information in any case, he can be given the right to move for specifications, and in a proper case the court would grant them, or the prosecution should be allowed to amend, but whenever the jury is impanelled all questions as to the nature of the charge should be regarded as finally settled.

"Under the practice which now prevails almost everywhere in this country, the indictment is used as a trap for the prosecution and a bulwark for the defense. The ingenuity of the state's attorney is taxed to the utmost in the effort to be sure that his indictment complies with every technicality, while the defendant's counsel exerts every faculty to find a flaw in his opponent's statement, so that instead of trying the guilt or innocence of the prisoner, the trial too frequently is reduced to a question as to the necessity of a few absurd words in an indictment. The so-called 'flaw in the indictment' is uniformly the resort of a convicted criminal. If the trial ends in an acquittal, either by order of the court or verdict of the jury, the prosecution can not appeal, since the defendant can not twice be placed in jeopardy. It is only after a trial in which all the evidence has been sifted and the question of guilt or innocence thoroughly argued, a trial in which the defendant has known exactly what he was charged with, and where the verdict has been so clearly right that either the defendant's counsel has not asked the trial court to set it aside, or the motion has been made and denied, that the appellate court is asked to reverse the judgment, not because the defendant is not guilty, and not because he has not been fairly tried, but because an indictment sufficient to inform everybody of the charge has or has not contained a few idle words. Too, often, though no one has been prejudiced by the omission, the court lets the guilty rascal go, not because justice requires it, but for no better reason than to preserve a particular fashion of speech."

2. Instructions:

In England and other countries and in the federal courts it is the practice for judges to sum up the evidence and to charge juries in regard to its weight and credibility. In Hawaii there is a statutory provision to the effect that the judge shall, in no case, comment upon the character, quality, strength, weakness or credibility of any evidence submitted or upon the character, attitude, appearance, motive or realiability of any witness sworn in the case. At the close of the evidence it is the custom, under statutory provision, for counsel to present to the judge requests for instructions which are passed upon, usually in the absence of the jury, and are then read to the jury as the instruction of the court. In some of the circuits of the territory it has not been the practice of the judges to give instructions other than those requested by counsel. The judge, by statute, is prohibited from making any oral comment upon or modification of the instructions requested. The result is unsatisfactory. The instructions of each party are frequently for the purpose of giving to its side of the case as favorable an appearance as possible. It must be apparent that a large number of instructions (there were fifty-three requested in a recent case) given to the jury on behalf of one party must create in the minds of untrained men a wrong impression as to the law in the case. The federal practice is being strongly endorsed in many of the states.

3. Comment Upon the Defendant's Failure To Testify.

The defendant in a criminal case is protected by constitution and statute from giving evidence which would tend to incriminate him, nor may any inference of guilt be drawn from his failure to take the stand in his own behalf.

Quoting again from Moorfield Storey: "The constitution provides that 'no person shall be compelled in any criminal case to be a witness against himself'. Originally the criminal could not testify at all, but statutes have given him this right, and have coupled it with the provision that if he elects not to take the stand no argument shall be made or inference drawn against him on account of his refusal.

"The practical absurdity of this provision is illustrated by the charge given by a very able judge in Massachusetts, who was asked to instruct the jury that no inference could be drawn from the fact that the defendant did not take the stand.

"'Yes,' he said, 'gentlemen, that's the law and we are all bound to obey the law. If the legislature were to pass a law that when you walk down State street and see the shadow of the old state house thrown across the street, you are not to infer that the sun is shining, you'd be bound to obey it, gentlemen, and so you're bound to obey this law.'

"Another judge of our state said with much truth, 'When the common law undertook to find a fact it began by excluding from the room all the persons who would be likely to have any knowledge of the subject,' to wit, the parties to the suit and all persons interested in the question to be tried. The rule which I am discussing is a conspicuous example of this absurd principle. The accused of all men in the world knows better than any one else whether he is guilty or not, and if the object of the criminal law is to detect and punish the guilty, why should he not be asked to tell what he knows? If he criminates himself, can there be better evidence of guilt? Why shouldn't he criminate himself? Eye-witnesses may be mistaken, circumstantial evidence may mislead, but the testimony of the accused against himself can be relied upon in any but the most exceptional cases.

(Continued on page fourteen)

PACKARD MAN SAYS 'BARGAIN' TRUCKS NOT UP TO STANDARD

"The lines are being drawn more closely about the so-called 'bargain' truck," says C. R. Norton, truck sales manager of the Packard Motor Car Company. "By a 'bargain' truck I mean one sold at a price so reduced as to necessitate sacrificing an essential factor such as quality and ability of the truck, service to the customer or profit to the dealer. And no purchaser can possibly feel secure when the price does not provide for all of these requirements.

"Even granting that the 'bargain' truck might possess ability, still service and a legitimate profit for the manufacturer and dealer remain to be accounted for, because even the best truck must have service, and anyone remaining in business must have a profit. It is not reasonable to suppose, nor will anyone who thoroughly studies the subject admit, that all three characteristics can be obtained in the 'bargain' truck as well as in the maximum service truck.

"In one respect at least, the truck business is not any different from any other business, that is, you get just what you pay for. When you enter the cut-price field, you have to steel yourself against the fictitious, abnormally high list price on the one hand and the 'bargain' truck on the other. In the first case the prices are listed at high figures with the avowed intention of being able to offer big discounts, and on the other hand, the plan is to make the price so attractive that you will buy, thinking you will get that for which you are not even asked to pay."